No. 98-436

(8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOHN H. ALDEN, et al.,

Petitioners,

—v.—

STATE OF MAINE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE STATE OF MAINE

BRIEF FOR THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC., THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC., THE AUTHORS GUILD, INC., COPYRIGHT CLEARANCE CENTER, INC., NATIONAL MUSIC PUBLISHERS ASSOCIATION, INC., AND THE SOFTWARE PUBLISHERS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

CHARLES S. SIMS
Counsel of Record
BRUCE F. BOYDEN
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036
(212) 969-3950

28pp

QUESTION PRESENTED

Where Congress creates a cause of action pursuant to its Article I powers and entrusts its enforcement to state courts, may states defending against such actions in state courts interpose a defense of sovereign immunity, notwithstanding the Supremacy Clause of the United States Constitution?

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AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amici, who file this brief with the consent of the parties, represent or license thousands of authors, publishers, and consumers of books, software, educational materials, and musical compositions who would have no meaningful protection from infringement by states and state entities if the claims of some states to sovereign immunity from suits under federal law in both federal and state courts were upheld.

Because of the extensive use state governments make of copyrighted materials — in state colleges and universities, in elementary and high school public education, in purchasing educational materials (software, books, sheet music) in some jurisdictions, in operating state university presses, in administering all the unpaid functions, programs and activities of a modern welfare and regulatory state — it is of vital importance to the creative community that copyright be fully protected against government infringement. *Amici* submit this brief, in a case involving no apparent copyright issue, because of their vital interest in ensuring that Congress *may*, if the need should arise, provide for effective copyright damage remedies against state infringement in state courts. Reversing the decision below appears essential to preserving Congress's power to do so.

In a recent decision, *Chavez v. Arte Publico Press*, 157 F.3d 282 (1998), vacated and rehearing *en banc* granted (10/1/1998), a Fifth Circuit panel held that despite Congress's

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

clear intent to abrogate state immunity from suit in federal court for copyright infringement, as reflected in the Copyright Remedies Clarification Act, Pub. L. 101-553, 104 Stat. 2749 (1990), that law exceeded congressional power. To minimize the impact of its holding and seemingly as a basis for its decision, the *Chavez* panel specifically noted that Congress could confer jurisdiction on state courts to hear copyright infringement suits. 157 F.3d at 291. *Alden v. Maine* calls that assumption into direct question.

Amici here have filed a friend-of-the-court brief in *Chavez* before the Fifth Circuit *en banc*, arguing (along with the United States and other *amici curiae)* that subjecting states to copyright infringement suits in federal court does not violate the Eleventh Amendment, *first*, because legislation doing so is within Congress' power to enforce the Due Process Clause under Section 5 of the Fourteenth Amendment, and *second*, because the state's own repeated use of the benefits afforded by copyright law results in a waiver of Eleventh Amendment immunity under the doctrine of *Parden v. Terminal Railway of Alabama,* 377 U.S. 184 (1964). However, if the Fifth Circuit ultimately holds that Congress has no power to subject states to copyright infringement suits in federal courts, and if this Court were to affirm that decision, then *amici* and other copyright owners would have no remedy from unfettered state infringement of copyright — *unless* Congress has the power to subject states to infringement remedies in state courts.

The basic presuppositions of the rule of law would be threatened if the Eleventh Amendment blocked Congress from providing for infringement suits against state infringers in both state and federal courts: notwithstanding Congress's undoubted power to subject states to the copyright law as a formal matter, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), *overruling National League of Cities v. Usery*, 426 U.S.

833 (1976), the courts would have deprived Congress of any power to enforce compliance with it and to vindicate the rights of those whose property states take by infringement. As this Court noted in *Marbury v. Madison*, 5 U.S. 137 (1803), "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," and it is "[o]ne of the first duties of government" to afford such protection. *Id.* at 163.

The same interests that have led the *amici* to argue for preservation of federal court jurisdiction over copyright suits in the Fifth Circuit in *Chavez* therefore lead them, anticipatorily but urgently, to support petitioners' position here. If a textually unmoored Eleventh Amendment jurisprudence were to strike down Congress's effort to provide for damage suits against state infringers in federal court, then *amici* would urge Congress to abandon its 200-year historic policy of granting federal courts exclusive jurisdiction over copyright cases and to entrust such cases to state courts. Their interest here is in leaving Congress with the power, granted by the Supremacy Clause, effectively to do so.

SUMMARY OF ARGUMENT

The Supremacy Clause and this Court's decision in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), control the result in this case. Under *Hilton*, where Congress intends to abrogate state sovereign immunity in a federal statute, the Supremacy Clause requires a state court to apply the statute against the state regardless of whether such immunity is asserted. *Hilton* is consistent with both the structure of our federal system and with this Court's precedents. On its face and as interpreted by this Court, the Supremacy Clause mandates that federal laws take precedence over state laws, including state doctrines of sovereign immunity.

The Eleventh Amendment does not override the Supremacy Clause with respect to sovereign immunity in state courts. The Amendment restricts only federal court jurisdiction, and says nothing about state courts. It did not adopt a general principle of universally effective sovereign immunity, as this Court's prior decisions demonstrate. Nothing in this Court's recent decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), altered the scope of this Court's prior Eleventh Amendment jurisprudence in this regard.

In any event, Maine's assertion of sovereign immunity in the petitioners' suit would result in the deprivation of petitioners' property (the compensation guaranteed by supreme substantive federal law) without due process of law. Accordingly, far from being beyond congressional power under the emanations or presuppositions of the Eleventh Amendment, the challenged provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, creating a cause of action in state court free of a sovereign immunity defense, is within not only Congress's power under the Commerce and Supremacy Clauses, but also its power under Section 5 of the Fourteenth Amendment to enforce the guarantee that no state shall deprive any person of property without due process of law.

ARGUMENT

I. THE SUPREMACY CLAUSE MAKES THE FLSA FULLY ENFORCEABLE IN MAINE'S COURTS, ASSERTIONS OF SOVEREIGN IMMUNITY NOTWITHSTANDING.

There is no doubt in this case that Congress has the authority to subject states to liability for violating the overtime provisions of the FLSA. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). The only question is whether state courts are required to hear such suits: that is, given that the State of Maine has been held immune from such

a suit in federal court, may Congress provide for the state court adjudication of a claim Congress has the power to create?

A. *Hilton v. South Carolina* governs the result in this case.

This Court's decision in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), is directly applicable and controlling in this case. In *Hilton*, a South Carolina state employee sued a state-owned railroad in South Carolina court under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. The trial court dismissed the suit for lack of a clear statement in FELA of Congress's intent to abrogate South Carolina's sovereign immunity. The South Carolina Supreme Court upheld the dismissal, citing this Court's recent decision in *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987), that the remedial scheme used in FELA did not abrogate states' Eleventh Amendment immunity in federal court. This Court reversed the decision of the South Carolina Supreme Court, holding, first, that the Eleventh Amendment did not apply to state court suits, *see Hilton*, 502 U.S. at 204-05; second, that under the applicable rules of statutory construction (including *stare decisis*), Congress intended to subject states to suit under FELA; and third, that the Supremacy Clause therefore made FELA "fully enforceable in state court," *id.* at 207.

Hilton is directly applicable to the case at bar. Maine, like South Carolina before it, has asserted that the FLSA does not override its sovereign immunity in state court; that defense is no more valid here than in *Hilton*. The Eleventh Amendment, as the *Hilton* Court held, does not apply to state courts. Furthermore, whereas the *Hilton* Court relied in part on the principle of *stare decisis* in holding that Congress has expressly sought to subject states to suit, here Congress's intent to subject the states to suit under the FLSA is unquestionable.

See Mills v. Maine, 118 F.3d 37, 42 (1st Cir. 1997) (citing cases). Therefore, under *Hilton*, the FLSA, like FELA, is "fully enforceable in state court," assertions of state sovereign immunity notwithstanding. *Hilton*, 502 U.S. at 207.

B. *Hilton* is consistent with the text of the Constitution and with this Court's precedents.

Hilton was not an anomalous decision, but rather was deeply rooted in both the Constitutional framework of federalism and in this Court's prior decisions.

In our federal system both the states and the national government retain some elements of sovereignty. The ultimate sovereignty, however, is held not by the states or the national government, but by the people. *See* U.S. Const. preamble ("We the People . . . do ordain and establish this Constitution for the United States of America."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819) ("The government proceeds directly from the people . . . ."); The Federalist No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed.) ("Here, in strictness, the people surrender nothing . . . ."). The people have delegated some powers to the national government and some powers to their state governments. *McCulloch*, 17 U.S. (4 Wheat.) at 410. While the people have decreed through the Eleventh Amendment that, in some circumstances, states are not subject to suit in federal courts, they have also decreed that the Constitution and all laws passed pursuant to it are "the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.[2]

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[2] The Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . , shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*." (Emphasis added.)

This Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), demonstrates the limits of state sovereign immunity. Given the fact that "[i]n this Nation each sovereign governs only with the consent of the governed," *id.* at 426, a state's desire to immunize itself from suit may be restricted by the decisions of the people of other jurisdictions. The *Hall* Court held that there was no constitutional bar based on Nevada's sovereign immunity that would prevent California's subjecting Nevada to a tort suit in California's courts. "The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect." *Id.* The people of the United States have adopted a different system with respect to the FLSA than the people of Maine. And here, unlike in *Hall*, the decisions are *not* equally entitled to the Court's respect. The Supremacy Clause demands that the decision of the people of the United States takes precedence over that of the people of Maine. Neither Maine, nor any other state, can reject the decision of supreme federal law.

Since Maine's courts must apply federal law, they must subject the state to suit under the FLSA as that law requires. It is beyond cavil that state courts have the power to decide questions under federal law generally. *See Palmore v. United States*, 411 U.S. 389, 402 (1973); *Testa v. Katt*, 330 U.S. 386, 390-91 (1947); *Mondou v. New York, New Haven & Hartford R.R.*, 223 U.S. 1, 56 (1912); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816). Indeed, state courts have the

obligation to enforce federal law. *See Howlett v. Rose*, 496 U.S. 356, 370 (1990) ("[O]ur cases confirm that state courts have the coordinate authority and consequent responsibility to enforce the Supreme Law of the Land."). And Congress has the authority to create federal causes of action that the states will enforce. *See New York v. United States*, 505 U.S. 144, 178 (1992) (referring to "the well established power of Congress to pass laws enforceable in state courts."). Anything less would be inconsistent with the Supremacy Clause. *See Printz v. United States*, ___ U.S. ___, 117 S. Ct. 2365, 2381 (1997); *New York*, 505 U.S. at 178.

Under *Howlett v. Rose*, Maine's courts cannot refuse to apply the FLSA against the state, even if Maine does not consent to suit. In *Howlett*, a Florida student sued his local school board under 42 U.S.C. § 1983 for violating his civil rights during a search of his car on school premises. This Court held that although the state itself was not subject to suit under § 1983, due to a lack of proof of Congressional intent to that effect, *see Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), Florida could not immunize state agencies such as school boards from such suits in state court. *Howlett* detailed three corollaries of the Supremacy Clause that govern when a state court must apply federal law against a state. First, "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse.'" *Howlett*, 496 U.S. at 369 (quoting *Douglas v. New York, New Haven & Hartford R.R.*, 279 U.S. 377, 387-88 (1929)).

Second, "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state courts to dissociate themselves from federal law because of . . . a refusal to recognize the superior authority of its source." *Id.* at 371. The refusal of the Maine Supreme Judicial

Court to apply the FLSA against the state was just such a refusal to recognize the national government's superior authority, since its decision was clearly inconsistent with the FLSA's provision that an employer includes any "public agency." *See* 29 U.S.C. § 203(d).

The third corollary from *Howlett* is that the Court must proceed with caution when a state court refuses jurisdiction "because of a neutral state rule regarding the administration of the courts." *Id.* at 371. To be sure, Congress cannot require a state to "create a court competent to hear the case in which the federal claim is presented." *Id.*; *see also Brown v. Gerdes*, 321 U.S. 178, 190 (1944) (Frankfurter, J., concurring) ("Congress may avail itself of state courts for the enforcement of federal rights, but it must take the state courts as it finds them . . . ."). But the mere fact that a state restriction on state courts is termed "jurisdictional" does not make it a legitimate excuse not to enforce federal law. *Howlett*, 496 U.S. at 381; *see also id.* at 382 ("The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word 'jurisdiction.'") At the very least, states cannot refuse to hear an action solely because it is based on federal law.[3] Here, as in *Howlett*, Maine

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[3] *Howlett* in fact went further, holding that a state court could not add immunities or defenses beyond those provided by the federal law. As noted above, the only reason that a state can escape liability in state court from § 1983 actions is because this Court has held that states were not *intended* by Congress to be sued under the statute. *See Will*, 491 U.S. at 64. "If the [Florida] District Court of Appeal meant to hold that governmental entities subject to [federal law] liability enjoy an immunity over and above those already provided in [the federal law], that holding directly violates federal law." *Howlett*, 496 U.S.

has established courts that hear "state law actions" against state defendants for the withholding of just compensation. Maine's refusal, therefore, to allow federal law actions under the FLSA against state defendants is, as was the similar refusal in *Howlett*, a "violat[ion of] the Supremacy Clause." *Id.* at 375. State courts must apply federal law to the states unless a constitutional or other legitimate doctrine bars such enforcement.

This Court's decisions in *Hilton*, *Hall*, and *Howlett* thus decisively reject the notion that, as the court below held, state sovereign immunity has been incorporated into the Constitution, either in the Eleventh Amendment or elsewhere, in such a way as to bar suits against states under federal laws in their own courts. The idea emerging instead from this Court's precedents and from the structure of the federal system is that state sovereign immunity is a creation of state law, enforceable only as permitted by the Supremacy Clause, and not a timeless command that trumps federal substantive law or prevents its enforcement. *See Hall*, 440 U.S. at 426 (finding that no federal rule implicit in the Constitution requires adherence to state sovereign immunity doctrine as it existed when the Constitution was adopted); *Howlett*, 496 U.S. at 383 ("[I]ndividual States may not exempt . . . persons from federal liability by relying on their own common law heritage. . . . States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People.").

Under the Supremacy Clause, no state law can override a federal statute passed pursuant to the Constitution. Neither a state statute, nor the common law, nor even the state's

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at 375; *see also id.* at 379-80 (Florida court cannot reject § 1983 claim when it adjudicates other claims against state entities, even if "for substantive policy reasons" it does not hear all such claims).

constitution can have such an effect. It does not matter how important the inconsistent law in question might be to the state. "'[T]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

States may, of course, waive their sovereign immunity and consent, via statute or other legal device, to be sued in their own courts. *See Seminole*, 517 U.S. at 65 (citing *Parden v. Terminal Ry. of Ala.*, 377 U.S. 184 (1964)). And since under the Supremacy Clause a federal statute has the same effect in state court as state law (including state constitutional law), there is no reason why such a statute could not abrogate a state's power to assert immunity in its own courts just as a state statute or constitutional amendment might. "Federal law is enforceable in state courts because the Federal Constitution and laws passed pursuant to it *are as much laws in the states as are laws passed by the state legislature*." *Howlett*, 496 U.S. at 367 (emphasis added). "The two together form one system of jurisprudence, which constitutes the law of the land for the State . . . ." *Claflin v. Houseman*, 93 U.S. 130, 137 (1876). Obviously, given that the national and state governments are distinct, there is the potential for inconsistencies in such a system. That is what the Supremacy Clause resolves. Federal law is supreme over inconsistent state law, including state laws creating sovereign immunity.

Of course, to ensure that Congress truly intended to subject states to suit, such a statute must contain the necessary "clear statement" of Congress's intent to do so. *See Will*, 491 U.S. at 65 (holding that whenever Congress "intends to alter the 'usual constitutional balance between the States and the Federal

Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'"). But as noted above, there is no doubt here that Congress made the necessary clear statement. *Mills*, 118 F.3d at 42. Because Congress clearly intended to subject states to suit under the FLSA, the FLSA is just as much a part of state law as any state statute or constitution, and it abrogates state sovereign immunity in Maine's courts just as would a Maine statute passed to the same effect.

It matters not that Maine may object to being sued under a federal statute. A state cannot resist enforcing federal law in its courts simply because the law "is not in harmony with the policy of the State." *Mondou*, 223 U.S. at 57. This is true whether the perceived conflict is over the substantive law or over what the appropriate forum for a certain right is. *See Howlett*, 496 U.S. at 375; *see also Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) (quoting *McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968)) ("A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced."). As long as Congress has the authority to subject states to liability in a certain area, and makes its intent to do so clear in the language of the statute, "the Supremacy Clause makes that statute the law in every State, fully enforceable in state court." *Hilton*, 502 U.S. at 207.

Finally, *Hilton* and *Howlett* are not inconsistent with decisions holding that Congress cannot command state legislatures or executive officers to enforce a federal regulatory scheme. This Court has specifically limited its holdings in such cases to lawmakers and executive officers, noting that state judges are bound by the Supremacy Clause to apply

federal law. See *Printz*, 117 S. Ct. at 2371 ("It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time"); *New York v. United States*, 505 U.S. 144, 178 (1992) ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause"); *see also Printz*, 117 S. Ct. at 2381 (noting that *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982), "required state administrative agencies to apply federal law while acting in a judicial capacity").

This Court should therefore hold that Maine cannot assert a defense of sovereign immunity to enforcement of the FLSA.

II. THE ELEVENTH AMENDMENT DOES NOT APPLY TO SUITS AGAINST STATES IN STATE COURTS.

The court below failed to even consider the Supremacy Clause, *see Alden v. State*, 715 A.2d 172, 177 (Me. 1998) (Dana, J., dissenting), basing its decision instead entirely on the Eleventh Amendment. As even that court admitted, however, "the Eleventh Amendment is not directly applicable to state courts." *Id.* at 174 (quoting *Moody v. Commissioner, Dep't of Human Servs.*, 661 A.2d 156, 158 n.3 (Me. 1995)). The holding below that the Eleventh Amendment reflects a broad principle of reserved states' rights that leaves Congress as powerless to abrogate state sovereign immunity in state courts as in federal courts, and the conclusion that to hold otherwise would "effectively vitiate the Eleventh Amendment," *id.* at 174-75, are insupportable.

A. The Eleventh Amendment restricts only federal judicial power.

This Court has repeatedly held that the Eleventh Amendment has no application to state courts, and has never adopted the principle of symmetry between state sovereign immunity in federal and state courts that the court below viewed as controlling.[4] The Eleventh Amendment restricts only federal court jurisdiction under Article III, not state court jurisdiction. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Of course, it is true that this Court has stated that the Eleventh Amendment embodies a broader principle than its mere textual provisions. The Court has thus "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)). Applying this logic, the Court has held (without textual warrant) that suits by citizens of a state against their own state under federal question jurisdiction in a federal court have been held to be barred under the Amendment. *See Hans v. Louisiana*, 134 U.S. 1, 13 (1890). But while there have been broad statements in dicta to the effect that the Amendment stands for the principle that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," *id.*,

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[4] *See Alden*, 715 A.2d at 174. *Hilton* explicitly rejected such a theory. Although "not . . . inconsequential," the rule favoring symmetry can be overcome. *Hilton*, 502 U.S. at 206.

none of these statements control the result here or invalidate *Hilton* or purport to overwhelm the Supremacy Clause.[5]

As this Court noted in *Nevada v. Hall*, cases such as *Hans*, while "emphasiz[ing] the widespread acceptance of the view that a sovereign State is never amenable to suit without its consent," all concerned the limits of federal court jurisdiction, and do not answer questions relating to sovereign immunity in state courts. *See Hall*, 440 U.S. at 420-21. Instead, this Court has uniformly denied that the Eleventh Amendment provides any guidance on the question of whether a state can assert immunity from a federal action in state courts. "[A]s we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts.'" *Hilton*, 502 U.S. 204-05; *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989) ("[T]he Eleventh Amendment does not apply in state courts."); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) ("No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States.'"); *Hall*, 440 U.S. at 420-21. The only issue posed by the Eleventh Amendment is "the susceptibility of the States to suit before federal tribunals"; the Amendment does not provide for "the general immunity of the States from private suit." *Atascadero*

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[5] Respondent's best argument based on this Court's prior opinions are based on four words in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994): "The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, *if the State permits*, in the State's own tribunals." (Emphasis added.) These four words of dicta are far too anorectic a basis to hold that *Hilton* and *Howlett* have been implicitly overruled.

State Hosp. v. Scanlon, 473 U.S. 234, 240 n.2 (1985) (quoting *Employees v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279, 293-94 (1983) (Marshall, J., concurring)). Consistent with this view, the federal courts have assumed, in the case of the FLSA, that a litigant barred by the Eleventh Amendment in federal court could nevertheless sue in state court. *See Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996). Indeed, this point is so obvious that this Court has stated that "[i]t denigrates the judges who serve on the state courts" to suggest that they will fail to grasp it. *Atascadero*, 473 U.S. at 240 n.2.

Not every statement in a judicial opinion is a measured demarcation of constitutional limits. For example, this Court declared in *Hans* that "[i]t may be accepted as a point of departure unquestioned . . . . that neither a State nor the United States can be sued as defendant in any court in this country without their consent" except under the Supreme Court's original jurisdiction. 134 U.S. at 17 (quoting *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883)). Yet this Court has several times since allowed unwilling states to be sued in various tribunals, all without overruling *Hans*. *See, e.g., California & State Lands Comm'n v. Deep Sea Research*, __ U.S. __, 118 S. Ct. 1464 (1998) (in rem admiralty case); *Hilton*, 502 U.S. 197 (allowing suit under federal law in state court); *Hall*, 440 U.S. 410 (allowing suit in another state's courts); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (immunity abrogated under Fourteenth Amendment); *Parden v. Terminal Ry. of Ala.*, 377 U.S. 184 (1964) (constructive waiver). And while it may generally be true that, as this Court recently stated, the Eleventh Amendment "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,'" *Seminole*, 517 U.S. at 58 (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)), the numerous cases

subjecting states to suit indicate that indignity avoidance is not the paramount concern of our federal system.

If statements such as those cited above were given literal effect, similar statements that the Fourteenth Amendment "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment," *Seminole*, 517 U.S. at 65-66, could be interpreted as granting unlimited power to the federal government. In fact, neither principle is without limits, as this Court has consistently recognized. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). The limits of state sovereign immunity lie in the text of the Supremacy Clause and in this Court's actual holdings, such as those in *Hilton*, *Howlett*, and *Hall*, not in the dicta used in those or other cases.

B. *Seminole* did not hold the Eleventh Amendment effective in state courts or superior to the Supremacy Clause.

Nothing in *Seminole* overruled this Court's prior holding in *Hilton* subjecting states "fully" to suit in state court under federal law. Although this Court stated in *Seminole*, in *dicta*, that the Eleventh Amendment derived from the "background principle" of state sovereign immunity, *Seminole*, 517 U.S. at 72, *Seminole*'s holding was consistently limited to "prohibit[ing] Congress from making the State of Florida capable of being sued in federal court." *Id.* at 76; *see also id.* at 54 ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'") (citing *Hans*, 134 U.S. at 15); *id.* at 63 ("It [is] well established . . . that the Eleventh Amendment [stands] for the constitutional principle that state sovereign immunity limit[s] the federal courts' jurisdiction under Article III."); *id.* at 64 ("The Eleventh Amendment restricts the judicial

power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."); *id.* at 72 (referring to statements of Framers "the most natural reading of which would preclude all federal jurisdiction over an unconsenting State").

III. BECAUSE MAINE'S REFUSAL TO AWARD IN STATE COURT THE WAGES CONCEDEDLY REQUIRED BY FEDERAL LAW WOULD VIOLATE THE DUE PROCESS CLAUSE, CONGRESS MAY CONSTITUTIONALLY SUBJECT MAINE TO SUIT IN STATE COURT FOR THOSE WAGES FREE OF ANY SOVEREIGN IMMUNITY DEFENSE.

Maine's assertion of sovereign immunity as a defense to Alden's FLSA claim has resulted in a deprivation of Alden's property without due process of law, in violation of the Fourteenth Amendment.

This Court has long held that where a state deprives an individual of property in violation of federal law, and then fails to offer a sufficient state court remedy, such a deprivation violates the guarantees of the Fourteenth Amendment. For example, "'a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is . . . itself in contravention of the Fourteenth Amendment,' the sovereign immunity States traditionally enjoy in their own courts notwithstanding." *Reich v. Collins*, 513 U.S. 106, 109-10 (1994) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930)); *see also McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990) (collection of tax without state law remedy is violation of Fourteenth Amendment); *Ward v. Board of County Comm'rs*, 253 U.S. 17, 24 (1920) (same).

Reich v. Collins involved a taxpayer who sought recovery of income taxes collected by the State of Georgia in violation of federal law. In *Reich*, as here (and as would be the case if Congress were eventually forced by adverse decision in *Chavez* to grant state courts jurisdiction over copyright infringement actions against state infringers), the claimant was barred from federal court because of the state's Eleventh Amendment defense. *See Reich*, 513 U.S. at 110. This Court unanimously reversed the decision of the Georgia Supreme Court and remanded the case for "meaningful" retrospective relief, notwithstanding any assertion of state sovereign immunity. *See id.* at 109-10, 114. Sovereign immunity is likewise no bar to an action for compensation for a taking under the Fifth Amendment. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987).

Maine's refusal to pay for overtime required by federal law is not distinguishable from Georgia's refusal to pay a tax refund required by federal law. In either case, a state has wrongfully deprived a plaintiff of property without remedy, and therefore without due process. Depriving persons of any effective remedy whatever for undoubted violations of law is the most serious kind of violation of the rule of law, as the Court's unanimous ruling in *Reich v. Collins* makes clear. *See also Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982) ("If the Constitution provided no protection against such unbridled authority, all property rights would exist only at the whim of the sovereign").

While *Reich* and *First English Evangelical Lutheran Church* appear to provide authority for insisting that Maine's courts create for Alden and those similarly situated a cause of action and a remedy, none is needed here. Under the circumstances, the evident due process violation created by

recognition of state sovereign immunity in state court from the petitioners' suit for recovery of their withheld overtime payments makes plain that the remedy chosen by Congress is within Congress's power under section 5 of the Fourteenth Amendment (the "Enforcement Clause"), which gives Congress the power to enforce, by "appropriate legislation," the prohibition against state deprivation of property without due process of law. Where, as in the FLSA, such legislation does not attempt to expand the scope of any substantive constitutional rule or otherwise encroach on state authority, but only ensures the very judicial remedy, in the state's own courts, that the Constitution requires (namely restoration of the property interest of which the state has wrongfully and without due process deprived the plaintiff), it is "appropriate" and well within congressional power. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be reversed.

Respectfully Submitted.

Charles S. Sims
Counsel of Record
Bruce E. Boyden
Proskauer Rose LLP
1585 Broadway
New York, NY 10036
(212) 969-3950